

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1104 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

SHOBHANABEN H PATEL

Versus

HARSHADBHAI RATILAL PATEL

Appearance:

MR AK CHITNIS for Petitioner

MR KV SHELAT for Respondent No. 1.

MR ST MEHTA, Addl. PP for Respondent No. 2

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 22/24-01-97

ORAL JUDGEMENT

Petitioner herein is the estranged wife of respondent No. 1 who filed Criminal Miscellaneous Application No. 77 of 1989 before the learned Metropolitan Magistrate, Ahmedabad and claimed a monthly maintenance of Rs. 500/- for herself and Rs. 400/ for each of the minor children from respondent No. 1 under

section 125 of the Criminal Procedure Code, 1973. The learned Magistrate, under his judgment and order dated 19th October, 1991, awarded monthly maintenance of Rs.350/- to each of the minor children. However, rejected the petitioner's application for maintenance. Feeling aggrieved, the petitioner preferred Criminal Revision Application No. 329 of 1991 before the learned Additional Sessions Judge, Ahmedabad who, under his judgment and order dated 10th March, 1992, rejected the same. Feeling aggrieved, the petitioner has preferred this petition under Article 227 of the Constitution of India.

2. While considering the petitioner's claim for maintenance, the learned Magistrate has relied upon the document Exh. 10 which is purported to be a Deed of Divorce taken in presence of the Social Workers of Jyoti Sangh. In the said Deed of Divorce, it has been mentioned that the petitioner shall have custody of the children and that she shall not claim any maintenance from the respondent No. 1. The petitioner and the respondent No. 1, however, failed to establish the customary divorce and the learned Magistrate has, therefore, held that the divorce has not taken place. However, the learned Magistrate considered the said document to be an agreement to live separately and came to the conclusion that the petitioner and the respondent No. 1 were living separately with mutual consent and, therefore, the petitioner, in view of the provisions contained section 125(4) of the Code, was not entitled to maintenance. The learned Magistrate has also relied upon the documents produced by Jyoti Sangh containing proceedings that took place before the Social Workers of Jyoti Sangh. Considering the said documents [Exh. 7], the learned Magistrate held that the petitioner was living in adultery and, therefore also, she was not entitled to maintenance. Finding of fact recorded by the learned Magistrate has been upheld by the revisional court and both the courts below have, therefore, rejected the claim of the petitioner for her maintenance.

3. Learned advocate Mr. Chitnis appearing for the petitioner has produced before this Court certified copies of the documents Exh. 7 and 10. He has contended that the findings recorded by the Courts below are perverse and require to be reversed. He has further contended that in no circumstances, the deed of divorce could have been treated as an agreement to live separate by mutual consent. Learned advocate Mr. Shelat has opposed this petition and has challenged the maintainability of this petition under Article 227 of the

Constitution of India. He has submitted that section 397 (3) of the Code prohibits second revision application by the aggrieved party and the petition filed under Article 227 of the Constitution to circumvent the bar under section 397(3) of the Code is not maintainable. He has contended that the petitioner and respondent No. 1 had agreed to live separately under the purported deed of divorce [Exh. 10] and, therefore, in view of the provisions contained under section 125 (4) of the Code, the petitioner was not entitled to maintenance under section 125 of the Code. He has further contended that there is concurrent finding of fact recorded by the Courts below that the petitioner and respondent No. 1 were living separately by mutual consent and, therefore, said finding should not be interfered with. In the alternative, he has submitted that in any event, if the Court holds that the petitioner is entitled to maintenance, the matter should be remanded to the trial Court for determination of maintenance keeping in view the income of respondent No. 1 husband or considering the income of respondent No. 1 which is determined by the trial Court, and considering respondent No. 1's liability to pay maintenance to the children, the petitioner ought not to be awarded monthly maintenance more than Rs.200/-.

4. It is, indeed true that the Courts have, time and again, cautioned against exercise of jurisdiction in a petition under Article 227 of the Constitution; particularly in view of the bar of second revision at the instance of the aggrieved party under section 397 (3) of the Code. However, in the present case, I would like to refer to the judgment of the Honourable Supreme Court in the matter of Jagir Singh v. Ranbir Singh and another [AIR 1979 SC 381]. The principles laid down by the Supreme Court in the said decision has been followed by this Court in the matter of Sulochanaben Pranjivan Patel v. Bhailalbai Shantilal Patel and another [1988(1) GLH UJ 29]. Both the Courts have observed that powers under Article 227 of the Constitution cannot be exercised unless some exceptional reason exists. In the present case, for the reasons recorded hereafter, I do consider that the facts are so exceptional that this Court has to exercise its jurisdiction under Article 227 of the Constitution in favour of the petitioner wife. The proceedings held before the social workers of Jyoti Sangh which are recorded and produced at Exh. 7 do reveal that respondent No.1 was unable to meet with the domestic expenditure and he, therefore, compelled the petitioner to maintain relationship with his friend Bharat Trivedi who helped him cover domestic expenditure. Even

respondent No. 1 and said Bharat Trivedi have made a statement that it was the respondent No. 1 who directed the petitioner to maintain relationship with said Bharat Trivedi and she had to maintain such relationship against her will. In view of the said statements, it cannot be said that the petitioner was living in adultery and, therefore, was not ready and willing to stay with respondent No. 1. The petitioner who was compelled to live in adultery to suit the needs of the husband cannot be denied maintenance on the ground that she was living in adultery. It is true that neither the petitioner nor respondent No. 1 has proved customary divorce and in that event, document Exh. 10 cannot be treated as a deed of divorce. But, in my view, at the same time, it cannot be treated as an agreement to live separately either. Neither of the parties under the said agreement had any intention to live separately unless they were treated to have been divorced. Hence, it cannot be held that the petitioner and respondent No. 1 had agreed to have separate residence as spouses. It is also proved that on account of the family disturbances and the financial constraints, the petitioner was being beaten and ill treated. In my opinion, therefore, both the Courts below have erred in holding that the petitioner was living separately with consent. The petitioner is, therefore, entitled to maintenance from respondent No. 1.

In support of his contentions, Mr. Shelat has relied upon the judgment in the matter of Shravan Sukhram Ubhale v. Sau. Durga Shrawan Ubhale and other [1989 CRI.LJ 211]. The Court, in that case, was considering the divorce by mutual consent by the man and his wife under which the wife had voluntarily surrendered her right to maintenance. In the present case, since it is held that the parties have failed to prove the customary divorce and that the parties cannot be said to have been divorced, the question of giving up right of maintenance under the deed of divorce [Exh. 10] does not arise. Thus, on the facts of the case, above judgment of the Bombay High Court is not attracted. Mr. Shelat has also relied upon the judgment of the Supreme Court in the matter of Bai Tahira v. Ali Hussain Fissalli Chothia and another [1979 CRI LJ 151]. In that case, the Court was considering a divorced Muslim Woman's right to maintenance under section 125 of the Code. The defence there was that the claimant paid the customary maintenance at the time of divorce and in view of the provisions contained in section 127(3) Clause (b) of the Code, the claimant was not entitled to maintenance under section 125 of the Code. The Court, considering the provisions of the Code and the objects of the said

provisions, held that;

" the payment of illusory amounts by way
of customary or personal law requirement
will be considered in the reduction of
maintenance rate but cannot annihilate
that rate unless it is a reasonable
substitute."

The Court proceeded further to confirm the order
of the trial Court awarding maintenance to the divorced
woman under section 125 of the Code. In my view, this
judgment does not lend support to the contention raised
by Mr. Shelat. Mr. Shelat has, lastly, relied upon the
judgment of the Kerala High Court in the matter of ASN
Nair v. Sulochana [1981 CRI LJ 1898]. In that case, the
facts were somewhat similar. Parties to the marriage had
executed deed of divorce which was held to be invalid.
The Court held that;

if the divorce is shown to be not valid
in law, their willingness or consent to
reside separately on the basis of
divorce, cannot be treated as a mutual
consent for separate residence as
spouses."

The contention of Mr. Shelat that keeping in
view the income of respondent No. 1, the petitioner
ought to be awarded monthly maintenance of Rs.200/- also
requires to be rejected. The learned Magistrate, also
considering the evidence produced before it has held that
the respondent No. 1 was earning around Rs.1200/- to
Rs.1500/- every month. Said finding has been confirmed
by the revisional court. In view of the said finding
recorded by the Courts below and also keeping in view the
maintenance allowed to the minor children, I hold that
the petitioner is entitled to monthly maintenance of
Rs.300/- from respondent No. 1.

6. I, therefore, direct respondent No. 1 to pay
monthly maintenance of Rs.300/- [Rs. three hundred
only] to the petitioner herein regularly every month
commencing from 1st February, 1997. Respondent No. 1
shall also pay arrears of amount of maintenance from the
date of the application No. 77 of 1989 made by the
petitioner before the learned Metropolitan Magistrate,
Ahmedabad till 31st January, 1997 within six months from
to day. Petition is allowed to the aforesaid extent.
Rule is made absolute accordingly. Writ to be sent
forthwith.